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NO. 92-1905

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1992

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, et al.,
Petitioners,
v.
UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, et al.,
Respondents.

HACH's Brief In Opposition To Resident Council Of Allen Parkway Village's Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does HACH have standing to appeal that portion of the order directed at HUD?

2. Did the Fifth Circuit Court of Appeals correctly find that petitioners failed to state a claim for which relief can be granted under 42 U.S.C. § 1983 and under the Frost-Leland Amendment?

PARTIES

The participants in the proceedings below were:

Plaintiffs:

Allen Parkway Village Residents Council
Linda Cooper
Shirley Johnson
Beatrice House
Sonya Givens
Gussie Culver

Defendants:

Housing Authority of the City of Houston
Joy Fitzgerald
Zinetta Burney
Sharon E. Katz
Vidal G. Martinez
Richard Ramirez
John Zipprich II

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NO. 92-1905

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RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENT BELOW

Respondents incorporate by reference the Petitioners' statement of opinions.

Respondents' Notice of Appeal is reprinted in the Appendix hereto, at p. 1a.

The Jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Respondents incorporate by reference the Petitioners' Statement of the Case.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT, NOR AMONG THE CIRCUITS, AND THE ISSUES PRESENTED ARE PRIVATE

The Petition for Writ of Certiorari should be denied for it is patently frivolous. Petitioners assert no reason either in fact or law for this court to grant the petition. Petitioners demonstrate no conflict between the opinion of the Fifth Circuit Court of Appeals and decisions of this court. Nor do petitioners point to a conflict among the circuits relating to any of the issues involved. Indeed, petitioners do not even allude to a conflict. The opinion of the Fifth Circuit Court of Appeals is fully in accord with decisions of this court and other circuits.

The issues presented in this case are purely private. The Frost-Leland Amendment, provides as follows:

> None of the funds provided by this Act or any other Act for any fiscal year shall be used for demolishing George Loving Place, at 3320 Rupert Street, Edgar Ward Place, at 3901 Holystone, Elmer Scott Place, at 2600 Morris, in Dallas, Texas, or *Allen Parkway Village, 1600 Allen Parkway, in Houston, Texas.*

This is an amendment to appropriations bill for the United States Department of Housing and Urban Development ("HUD"), introduced by Congressmen Marvin Frost and Mickey Leland. By its terms, it is limited to three public housing developments in Dallas and Allen Parkway Village ("APV") located in Houston, Texas. Thus, the issues presented in this case are narrow and unique to its facts, and do not warrant review on Certiorari.

II.

HACH HAS STANDING TO APPEAL THAT PORTION OF THE ORDER DIRECTED AT HUD

The Housing Authority of the City of Houston ("HACH") filed a timely Notice of Appeal from the order of the District Court. (See Appendix, p. 1a). Most of that order is directed at HACH, but the court also ordered "that HUD shall set aside such funds as remain from the $10,000,000.00, approved appropriation such that these funds are not to be transferred to other projects until further orders of this Court. Any expenditures of these funds shall be approved by this Court." The Fifth Circuit Court of Appeals reversed this order in its entirety and remanded the case with instructions that the plaintiffs' complaint be dismissed. Petitioners challenge HACH's standing to appeal that portion of the order and the dismissal of the complaint in its entirety.

The Fifth Circuit Court of Appeals was correct in finding that HACH has standing to appeal the validity of all portions of the district court's order, including the part that is "nominally directed" to HUD. The appellate court did not err when it found that HACH is more than just a "concerned bystander" and has a "direct monetary stake in attacking this portion of the district court's order." This ruling is fully in

accord with decisions of this court and the Fifth Circuit Court of Appeals and there is no conflict with other circuits. The Fifth Circuit Court of Appeals correctly applied this court's decisions in *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979); *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1369, 31 L.Ed.2d 636 (1972). The petitioners do not even suggest that the Fifth Circuit Court of Appeals misapplied these decisions.

Petitioners refer to three (3) opinions of the Fifth Circuit Court of Appeals, seemingly suggesting that they are contrary to the ruling of the Fifth Circuit Court of Appeals in this case. They are wrong. In *Machella v. Cardenas*, 659 F.2d 650, 652 (5th Cir., 1981), a class representative sought to appeal a denial of a Motion to Intervene filed by a putative class member who did not herself appeal. The court found that Machella was not aggrieved by the denial of this Motion to Intervene and had no standing to appeal. Certainly, petitioners cannot seriously contend that *Machella* is in conflict with the ruling of the appellate court in this matter. *Machella* simply correctly applied the standing requirement. Machella was just a "concerned bystander"; HACH is not.

The Second Circuit Court of Appeals in *Assoc. Against Discrimination in Employment, Inc., et al v. City of Bridgeport, et al*, 710 F.2d 69, 73 (1983), found that an organization representing incumbent, non-minority firefighters had no cognizable interest in the filling of vacancies by minority or non-minority candidates and thus, lacked standing to appeal in order providing that relief. That decision of the First Circuit comports with decisions of this

court requiring standing and the ruling of the appellate court in this case. Unlike BFME, HACH has a direct monetary stake in attacking that portion of the district court's order that required HUD to set aside money that had already been appropriated to HACH. The district court found that HACH was using the very funds that it ordered HUD to set aside. Clearly, HACH had a direct monetary stake. HACH suffered a clear, actual injury within the meaning of *Diamond*, *supra*.

United States v. City of Miami, Fla., 664 F.2d 435, 445 (5th Cir., 1981), cited by petitioners, is of no help to their position. In *City of Miami, supra*, the Fifth Circuit Court of Appeals held that a consent decree settling an employment discrimination lawsuit between the city and a collective bargaining agent for police officers was valid as between those parties, but was not valid as to a nonconsenting organization of police officers whose members were affected by the decree. However, the Fifth Circuit Court of Appeals correctly recognized that an order entering a consent decree containing an injunction is appealable by any party adversely affected. HACH is adversely affected by the entire order of the district court.

The Fifth Circuit Court of Appeals correctly treated HUD as an amicus curiae. The appellate court found that HUD had an interest in HACH's appeal, but is not a party to the appeal. HUD "realigned" itself for the purposes of filing a brief in support of HACH's appeal. Thus, the Fifth Circuit Court of Appeals correctly noted that HACH is not an "appellant." The appellate court's references to HUD recognized that interest and status, and does not convert HUD to an appellant.

HACH has the requisite standing to appeal the entire order of the district court. The ruling of the Fifth Circuit Court of Appeals is in full accord with decisions of this court, its own and those of other circuits. Petitioners failed to point to any error of law.

III.
THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT PETITIONERS FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1983 AND UNDER THE FROST-LELAND AMENDMENT

The Fifth Circuit Court of Appeals did not err in finding that the Frost-Leland Amendment did not impose a binding obligation on HACH. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) and *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990) do not support petitioner's position. The Fifth Circuit Court of Appeals correctly applied *Wilder, supra*. The Frost-Leland Amendment is an appropriations rider directed solely to HUD, a federal agency. It cannot be equated with the Boren Amendment which imposes direct obligations on states. The Fifth Circuit Court of Appeals recognized that since the Frost-Leland Amendment was a directive to HUD, it, not private individuals, should enforce the prohibition against using federal funds to demolish the specified public housing, noting that "indeed, it is difficult to believe that Congress would impose a binding obligation on the states in an amendment to a bill appropriating funds to a federal agency." Under either the *Wilder* analysis or this courts opinion in *Suter v. Artist M.*,_____ *U.S.* _____, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Frost-Leland Amendment does not create an enforceable federal right in favor of the petitioners.

Since the Fifth Circuit Court of Appeals found that the Frost-Leland Amendment did not create federal enforceable rights, that court correctly followed this court's direction in *Suter, supra*, and "quickly" disposed of the claim that the amendment created an implied right of action. The appellate court's reliance on *Suter* is correct.

Petitioners' attempts to maintain an action under the Frost-Leland Amendment and under 42 U.S.C. § 1983 against HUD was correctly rejected by the Fifth Circuit Court of Appeals. Obviously, no claim against HUD could be made under § 1983, since HUD is a federal agency and § 1983, is a limitation on State, not Federal, action. The appellate court, also, correctly found that petitioners' attempts to maintain an action against HUD directly under the Frost-Leland Amendment was misplaced. Petitioners are limited to a cause of action against HUD under the Administrative Procedure Act.

Petitioners assert that the Fifth Circuit Court of Appeals erred in finding that the Frost-Leland Amendment did not impose a binding obligation on HACH. Petitioners, however, find no support in either the *Pennhurst* or *Wilder* opinions of this court. Petitioners failed to discern the factual difference between an appropriations amendment and a federal statute that imposes binding obligations on states. Clearly, the Fifth Circuit Court of Appeals was correct in finding that the Frost-Leland Amendment, an appropriations rider, does not create federal rights that are enforceable by a private cause of action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

United States District Court
Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, ET AL.	§	
	§	
VS.	§	**CIVIL ACTION**
NO. II-89-0292	§	
	§	
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL	§	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT the **HOUSING AUTHORITY OF THE CITY OF HOUSTON, EARL PHILLIPS, ZINETTA BURNEY, SHARON E. KATZ, VIDAL G. MARTINEZ, JOHN ZIPPRICH, II** and **SAM RODRIGUEZ**, Defendants in the above cause, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order granting a permanent injunction entered in this action on April 3, 1991.

Respectfully submitted,

/s/ Gabrielle K. McDonald by permission CAG
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